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S.B. CIVIL MISC. APPEAL NO.1642/2006.
(National Insurance Co. Ltd. Vs. Smt. Maina Devi & Ors.)

Date of Order :: 08.01.2007.

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Jagdish Vyas, for the appellant.

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BY THE COURT:

The insurer of vehicle involved in accident, having been accorded permission to contest the claim under Section 170 of the Motor Vehicles Act ('the Act') by the Tribunal, seeks to question the finding on responsibility towards accident by way of this appeal preferred against the award dated 24.06.2006.

On 10.02.2002, Om Prakash, about 27 years in age, husband of the claimant No.1 and son of the claimant No.2, working as constable in the Police Department, while on patrol duty met with the accident at about 2:45 a.m. on National Highway No.8 near Check-Post Choubara Tan Choubara when he alighted from the jeep, allegedly to answer the call of nature, on being hit by a truck bearing registration No. RJ14 G 0656 driven by the non-applicant No.1 Banshi Ram, owned by the non-applicant No.2 Narhari and insured with the non-applicant No.3, the present appellant, National Insurance Company Limited.

Narrating the incident, the claimants averred in their application for compensation that after hitting Om Prakash, the truck driver sped away towards Behror; Om Prakash was being taken to Behror Hospital but he succumbed to the injuries on the way. Stating pecuniary and non-pecuniary losses, the claimants claimed compensation in the sum of Rs.78,20,000/-. The Insurer in its reply to the claim application while admitting the insurance coverage of the vehicle in question, alleged that the accident occurred for the negligence and mistake on the part of the deceased Om Prakash as he was attempting to cross the road in contravention of the traffic rules.

On the pleadings of parties, the Tribunal framed necessary issues and in evidence the claimants examined Maina Devi as PW-1 and Hari Ram as PW-2 and produced documentary evidence in the form of FIR Ex.1, Charge-sheet Ex.2, Site Inspection Memo Ex.3, Postmortem Report Ex.4, Registration Certificate of the Truck Ex.5, Driving Licence Ex.6, Insurance Cover Note Ex.7 and Notice under Section 133 of the Motor Vehicles Act Ex.8. The record of the claim case shows that the non-applicants Nos.1 and 2 remained ex parte and the non-applicant No.3 i.e. the present appellant-insurer, despite having obtained permission under Section 170 of the Act chose not to lead any evidence at all and voluntarily closed its evidence on 10.04.2006.

After hearing the parties, the Tribunal has proceeded to consider the material available on record and has found that the accidental death of Om Prakash on being hit by the truck in question was a fact established on record; and the non-applicant No.3, insurer had of course taken the plea of negligence on the part of the deceased but in support of such averments, no evidence, oral or documentary, has been adduced. The Tribunal has referred to the charge-sheet Ex.2 and Site Inspection Memo Ex.3 and found that the truck in question caused the accident by hitting the deceased Om Prakash on the road coming rashly and negligently from the side of Delhi while intruding into a “VIP Lane”. The Tribunal observed that the claimants have not produced any eye-witness but then, the non-applicant No.1, the truck driver who was the important eye-witness to the accident neither filed any reply to the claim application nor was produced in evidence and, therefore, the facts asserted by the claimants stood unrebutted. The Tribunal has, therefore, held the accident to have occurred for rash and negligent driving of the truck and the non-applicants liable for compensation. For quantification of compensation, the Tribunal has taken the income of the deceased at Rs.4,697/- per month on the basis of his last pay certificate and taking the static figure of Rs.4,697/- for the average income of the deceased and then deducting one-third

on the personal expenditure of the deceased and with application of multiplier of 18 has assessed pecuniary loss at Rs.6,76,368/-, rounded up to Rs.6,76,500/-. The Tribunal has further allowed non-pecuniary losses and funeral expenses and in all has found the claimants entitled for compensation in the sum of Rs. 7,11,500/- with interest @ 7.5% per annum after adjustment of Rs.50,000/- received under No Fault Liability.

While making the award aforesaid, the Tribunal has consciously taken note of the fact stated by the claimant No.1 in her statements that a daughter Kumari Priyanka was born to her seven months after the incident who was now about 3 ½ years of age. The claim application was filed on 03.07.2002 in relation to the incident in question that occurred on 10.02.2002 and it seems that in those circumstances the daughter of the deceased could not have been impleaded as party at the time of filing of the claim application. However, the Tribunal has proceeded to apportion the award amount in the manner that it has allowed Rs.1,00,000/- to the applicant No.1 Smt. Maina Devi, wife of the deceased; Rs.61,500/- to the claimant No.2 Hari Ram, father of the deceased and has awarded the remaining amount of Rs.5,00,000/- to the daughter of the deceased, born seven months after his death, to be kept in fixed deposit till she attains majority with the claimant No.1 mother being entitled to receive periodical interest thereupon

for the purpose of her maintenance and education. Though the amount of compensation awarded should be deposited by the person responsible to make payment within 30 days of passing of the award yet the Tribunal has proceeded to grant two months' time in the present case to the appellant-insurer for depositing the award amount.

This appeal against the award dated 24.06.2006 was presented on 17.08.2006 but was dealt with by the office only on 03.11.2006 as no application for early listing of the matter was moved. Then, the matter came up for consideration before the Court for the first time only on 10.11.2006 when the record was requisitioned.

Learned counsel Mr. Jagdish Vyas appearing for the appellant-insurer has strenuously contended that the claimants have merely examined themselves and have not adduced any other evidence and the Tribunal has been in error in inferring negligence on the part of the truck driver merely on the basis of the police investigation papers. Learned counsel referred to the site inspection memo and submitted that the finding regarding negligence of the truck driver is not correct and not compatible with the situation at site that shows that the victim alighted from the jeep on a running Highway in the darker hours at 2:45 a.m. and then attempted to cross the road when he collided with the truck in question though the truck driver

attempted his best to avoid the incident. Learned counsel submitted that the incident occurred exclusively for the negligence on the part of the deceased and, therefore, no liability could have been fastened on the non-applicants.

Having given a thoughtful consideration to the submissions made by the learned counsel for the appellant and having scanned through the entire record, this Court is clearly of opinion that this appeal is bereft of substance and deserves to be dismissed without being admitted.

The submission of the appellant on negligence of the deceased lacks in basic foundation inasmuch as the non-applicants have chosen not to lead any evidence in this case. None of the claimants were available at the site and they have produced relevant evidence in the form of police investigation papers available with them. The claimants have primarily been able to establish that the deceased, a pedestrian, was hit by the truck on the Highway. In the circumstances surrounding the incident where the vehicle hit a person on the road, it cannot be presumed that the person concerned on his own attempted to throw himself in front of the vehicle in question. The onus was, therefore, on the non-applicants to clarify the facts of the case and in the circumstances of this case, the truck driver was an essential and material witness. The Tribunal has rightly observed that the non-applicants have failed to adduce relevant

evidence particularly in the form of truck driver,non-applicant No.1 who was the eye-witness directly related to the incident; and has rightly drawn inference against the non-applicants for not producing him.

Even otherwise, upon examining the site inspection memo Ex.3 with the surrounding circumstances, it is noticed that the deceased was a police constable and a part of the patrolling party travelling in a Government jeep. The jeep in question was parked inside the “VIP Lane” on the Highway. In fact, the cabins of the Transport Department and so also of the Commercial Taxes Department have been shown located across the road in alignment of the point of incident.

The victim was definitely within his right to alight from the vehicle inside the “VIP Lane” that is not meant for thorough-fare of other vehicles; and in any case the truck bearing registration No. RJ14 G 0656, a goods vehicle, could not have been taken to the said lane at all. It is shown in the site inspection memo that the truck not only intruded into the “VIP Lane” but was proceeding in a brisk speed and could not be brought to halt despite having been put to brakes and skidded for nearly 19 paces. It is obvious from a bare look at the situation at site that the truck was being driven rashly and negligently and in an irresponsible manner and was taken to the “VIP Lane” where it was not supposed to be taken at all and

despite application of brakes could not brought to halt. It appears that the non-applicants were conscious of the fact situation of the case and, therefore, chose not to lead any evidence before the Tribunal.

So far quantification of compensation is concerned, though learned counsel for the appellant-insurer frankly conceded that the quantum of compensation is not sought to be put to contention in this appeal, this Court is of opinion that what to say any challenge to the quantum of compensation by the insurer, the award in question would call for modification by upward revision in favour of the claimants if challenged by them. The victim was a police constable in 27 years of age and yet for the purpose of taking his average income, the Tribunal has adopted a static figure of Rs.4,697/- on the basis of his last pay certificate and has totally omitted to consider that in view of the young age of the victim and for his being in a settled job, there was every likelihood of future enhancement in earning. However, no appeal for enhancement of the award amount on behalf of the claimants seems to have been preferred in this matter; hence, the proposition for enhancement of the award amount in this case is not taken up, however, if the claimants would have preferred any appeal for enhancement, it would definitely have been a matter for consideration of enhancement of the award amount.

Apart from the conclusion aforesaid that the findings on responsibility towards accident are just and proper and the award on its quantification is much on the lower side; this appeal by the insurer deserves to be dismissed for being fundamentally incompetent.

As noticed above, the Tribunal has proceeded to apportion a major part of the award amount in the name of Kumari Priyanka, daughter of the victim who was born after his death; and, obviously, after filing of the claim application. The insurer, despite being aware of the fact that major part of the award amount has been apportioned in favour of the daughter of the deceased, has chosen not to implead her a party in this appeal though this fact regarding birth of Kumari Priyanka finds mention in the impugned award on the basis of statements of claimant No.1. The Tribunal has very rightly taken conscious note of the relevant facts and circumstances and of the rights of the minor and has very rightly apportioned a major part of the award amount in her favour. The appellant-insurer having chosen not to implead her a party in this appeal, the award in question cannot be disturbed against the interests of a minor.

Faced with the query raised by this Court about non-impleadment of Kumari Priyanka as a party in this appeal, learned counsel Mr. Jagdish Vyas appearing for the appellant-insurer in the first place attempted to submit that for her being

not impleaded as a party in the claim application, she could not have been made a party in this appeal but then submitted that the appellant-insurer may be permitted to implead her a party in this appeal or she may be impleaded a party by the Court. For this purpose, learned counsel has referred to the provisions of Order XLI Rule 20 of the Code of Civil Procedure that read thus:

> "**Power to adjourn hearing and direct persons appearing interested to be made respondents.-**(1) Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.
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> (2) No respondent shall be added under this rule, after the expiry of the period of limitation for appeal, unless the Court, for reasons to be recorded, allows that to be done, on such terms as to costs as it thinks fit."

The submissions so made by the learned counsel for the appellant-insurer with reference to the provisions of Order XLI Rule 20 of the Code of Civil Procedure cannot be accepted for the fundamental reason that such provisions apply when it appears at the time of hearing that any person who was a party before the court below has not been made a party to the appeal; and he would be interested in the result of the appeal. In such eventuality, the hearing may be adjourned

and such person may be directed to be joined as the respondent. The present appeal has not even been admitted for hearing; and the stage of hearing having never reached, the provisions of Order XLI Rule 20 do not apply at all.

Then, no order adverse to the interests of the said minor Kumari Priyanka are under contemplation and, therefore, there appears no reason for permitting the appellant to implead her as a party now. Then, sub-rule (2) supra specifically provides that no respondent would be added under this rule after the expiry of period of limitation, unless allowed so to be done for reasons to be recorded by the court. In the scheme of the beneficial legislation of the Motor Vehicles Act, this Court is clearly of opinion that an insurer of the offending vehicle cannot be extended such liberty and latitude in appeal of not impleading a necessary party in the first place and then to grant such request of impleadment after the expiry of period of limitation only when the flaw is pointed out by the court. The interpretation of the provisions of Order XLI Rule 20 CPC in the context of the scheme of the Motor Vehicles Act, 1988 and the fact situation of the present case could only be against the appellant-insurer because the reasons to be recorded, as contemplated by the said rule, are only to the effect that the appellant-insurer cannot be permitted to implead a necessary party, that too a minor, to the appeal after expiry of period of

limitation. The appeal deserves to be dismissed on this count too.

In the aforesaid view of the matter, this appeal fails on merits as well as on competence and is, therefore, dismissed summarily.

On being asked as to whether the appellant-insurer has deposited the amount payable under the impugned award or not, learned counsel for the appellant submitted that to his information no such deposit has been made in view of pendency of this appeal. As noticed above, under the impugned award dated 24.06.2006 the appellant-insurer was granted two months' time for depositing the award amount by the Tribunal and then this appeal was filed within two months after the passing of the award but was dealt with on 03.11.2006 and then listed for the first time before the Court on 10.11.2006. This Court is clearly of opinion that under the scheme of the Motor Vehicles Act, 1988 and particularly in view of sub-section (3) of Section 168 of the Act, the person liable to make payment of amount under the award in question cannot obviate the requirements of law of depositing the award amount within 30 days of the date of award only in the name of filing of appeal; and cannot grant stay unto himself. Such an approach could least be countenanced when coming up from non else than an Insurance Company.

It is required of the persons under liability under the award made by the Tribunal to adhere to the requirements of law of depositing the amount under the award within 30 days as contemplated under Section 168 of the Act. Even though the provisions of Section 173 of the Act provide for a period of 90 days for filing of appeal, that by itself cannot be of extending immunity to the person under liability under the award from the operation of Section 168 (3).The person under the liability, like the insurer, cannot be extended such a latitude to take the appeals at their own leisure and then to grant stay to themselves by not depositing the award amount for unreasonably long time.

Having regard to the facts and circumstances of the present case where the appeal is being dismissed summarily, no further orders are being passed in this regard; but it shall now be required of the appellant-insurer to deposit the amount payable under the award in question, if not already deposited, within 30 days from today with the Tribunal and the Tribunal shall proceed with the apportionment and disbursement of the award amount as contemplated under the award.

(DINESH MAHESHWARI), J.

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